00-1021 (20)

In The

Supreme Court of the United States

RUSH PRUDENTIAL HMO, INC.,

Petitioner,

v.

DEBRA MORAN and STATE OF ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The Unites States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Insurance Commissioners (NAIC) respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as an amicus curiae in this case in support of the Petition for a Writ of Certiorari, and in support of its motion states:

1. Counsel of record for NAIC attempted to obtain the consent of all parties to the filing of an amicus curiae brief by NAIC by contacting the parties' counsel of record.

2. The Petitioner, Rush Prudential HMO, has consented to the filing of an amicus curiae brief by NAIC through its counsel of record, John G. Roberts, Jr., Hogan & Hartson, L.L.P.

3. The Respondent, State of Illinois, has consented to the filing of an amicus curiae brief by NAIC through its counsel of record, Deborah L. Ahlstrand, Office of the Attorney General.

4. The Respondent, Debra Moran, has denied NAIC's request for consent.

5. NAIC has a strong interest in this case as set out fully in the brief submitted with this motion.

WHEREFORE, premises considered, the National Association of Insurance Commissioners respectfully moves this Court for leave to file a brief as amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation comprised of the chief insurance regulators in each state, four territories and the District of Columbia. The NAIC assists these officials in the pursuit of fundamental insurance regulatory objectives, including: (1) maintaining and improving state regulation in a responsive and efficient manner; (2) maintaining the reliability of insurance business with respect to financial solidity and guarantees against loss; and (3) ensuring fair, just and equitable treatment of policyholders and claimants.[2]

The issue before this Court implicates the NAIC's objectives because it addresses whether the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (1999), preempts state independent review laws that regulate insurance within the meaning of ERISA's saving clause, § 514(b)(2)(A).

The NAIC adopted the Health Carrier External Review Model Act (Model Act), Model No. 75, *I NAIC Model Laws, Regulations and Guidelines* (2000), on October 4, 1999. Generally, the Model Act provides for independent review of health carrier coverage decisions based on medical judgment. By adopting this Model Act, the NAIC declared that the independent review of certain claims determinations furthers the NAIC mission – to ensure the fair, equitable and just treatment of insurance consumers.[3]

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than this Amicus Curiae, made a monetary contribution to the preparation and submission of this brief.

[2] NAIC Constitution, Article II. Mission Statement, *I NAIC Proceedings*, 1997, at iv.

[3] *Id.*

This Court should affirm insurance regulators' ability to protect insurance consumers by adopting the rationale of the Seventh Circuit's decision in *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959 (7th Cir. Oct. 19, 2000), *petition for cert. filed* (U.S. Dec. 22, 2000) (No. 00-1021), or alternatively, adopting the Second Circuit's rationale in *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995).

SUMMARY OF ARGUMENT

The issues before this Court in *Rush Prudential HMO, Inc. v. Debra C. Moran, et al.* 00-1021 are identical to those at issue in *Montemayor v. Corporate Health, Ins. Co.*, No. 00-665.[4] The NAIC filed a Brief as Amicus Curiae in Support of the Petition to Grant a Writ of Certiorari in *Corporate Health*, which fully sets forth the reasons why this Court should grant the petition in that case. Many of the arguments raised in the NAIC amicus brief in *Corporate Health* apply equally in the instant case. The NAIC refers this Court to the NAIC amicus brief in *Corporate Health* for a full review of the NAIC arguments that also apply in support of the petition in *Moran*.

The Seventh Circuit holding in *Moran v. Rush Prudential*, 230 F.3d 959 (2000), cannot be reconciled with the Fifth Circuit's holding in *Corporate Health*. The courts in *Corporate Health* and *Moran* came to opposite conclusions regarding whether the independent review law at issue created an alternative enforcement mechanism to ERISA § 502 and was therefore preempted by ERISA.

Independent review laws like the one at issue in the petition are laws of great public importance. Thirty-eight states plus the District of Columbia have enacted independent review laws. It is critical that this Court validate

[4] *Corporate Health Ins. v. Dep't of Ins.*, 215 F.3d 526 (5th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3455 (U.S. Oct. 24, 2000) (No. 00-665).

state independent review laws, which protect consumers from conflicts of interest in the administration of health insurance coverage.

This Court should not revisit the issue of whether state independent review laws regulate insurance within the meaning of ERISA's saving clause § 514(b)(2)(A). The Seventh Circuit in *Moran* and the Fifth Circuit in *Corporate Health* both held correctly that the state independent review laws were within the insurance saving clause.

This Court should affirm the rationale of the Seventh Circuit and hold that state independent review laws merely add terms to insurance contracts, which are enforceable through suits under ERISA. Alternatively, if this Court should find that state independent review laws create a remedy or enforcement mechanism that supplements § 502 of ERISA, this Court should hold that the laws are not, nevertheless, preempted. This Court should revisit its opinion in *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987), and clarify that, by its plain language, ERISA's saving clause, § 514(b)(2)(A), limits the preemptive effect of § 502.

ARGUMENTS

A. The Seventh Circuit decision in *Moran* and the Fifth Circuit decision in *Corporate Health* conflict as to whether state independent review laws provide an alternative enforcement mechanism to ERISA § 502.

Texas and Illinois have enacted very similar independent review laws. Both provide for independent physician review of coverage determinations made by managed care organizations, based on whether a covered service is medically necessary.[5] Both independent review

[5] Tex. Ins. Code art. 20A.12A; 21.58A § 6(c); 21.58A § 6A; 20A.09(e), and 21.58A § 6(b) (West 2000) and 215 Ill. Comp. Stat. 125/4-10 (2000).

laws require that the plan comply with the decision of the independent reviewer.[6]

The laws differ most significantly in the level of detail provided in the independent review laws. The Texas independent review law includes a comprehensive description of the independent review procedure and the utilization review procedures that form the basis for the independent review.[7] The Illinois independent review law does not contain a similar description of the independent review procedures or preliminary procedures prior to the independent review. The laws also differ in the kinds of decisions that are eligible for independent review. The Texas law limits review to concurrent and prospective denials based on medical necessity.[8] The Illinois law requires independent review of disputes between a primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service.[9]

In 1999, however, the Illinois Legislature adopted the Managed Care Reform and Patient Rights Act.[10] This Act contains provisions that expand and further define the Illinois independent review procedure contained in Section 4-10.[11] Similar to the description of the preliminary

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[6] Tex. Ins. Code art. 21.58A § 6A(3) and 215 Ill. Comp. Stat. 125/4-10.

[7] Tex. Ins. Code art. 21.58A and 21.58C.

[8] Tex. Ins. Code art. 21.58A § 2(20).

[9] 215 Ill. Comp. Stat. 125/4-10.

[10] 215 Ill. Comp. Stat. 134/1 *et seq.* (2000).

[11] "Compliance with this Act's appeals procedures shall satisfy a health care plan's obligation to provide appeal procedures under any other State law or rules." 215 Ill. Comp. Stat. 134/45. "Health maintenance organizations are subject to the provisions of the Managed Care Reform and Patient Rights Act." 215 Ill. Comp. Stat. 125/5-3.6.

appeal of a utilization review decision, which is the underpinning of the Texas independent review law, Section 45 details the procedures for obtaining a preliminary appeal, the denial of which is subject to independent review. Section 45 also supplies the details as to timeframes for the independent review. This level of detail is similar to that in the Texas law.[12] The differences between Section 4-10 in the Illinois law and the Texas independent review law do not lessen the conflict between the Fifth Circuit and Seventh Circuit decisions. The essential conflict remains – whether ERISA preempts state laws that create a procedural right to independent review.[13]

Both the Fifth Circuit and the Seventh Circuit held that the state independent review laws regulate insurance within the meaning of the saving clause. However, the Fifth Circuit and the Seventh Circuit reached opposite conclusions regarding whether the state independent review laws were preempted by ERISA.[14] The Seventh Circuit acknowledged that its decision created a direct conflict with the Fifth Circuit and circulated its opinion to

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[12] For a comparative chart of 38 state independent review laws, plus the District of Columbia, including the Texas and Illinois laws, see NAIC, *External Grievance Review Procedures*, Oct. 1, 2000 (*available in* www.naic.org/1whatsnew/).

[13] This more detailed independent review law is not at issue in *Moran*, therefore, the Texas law at issue in *Corporate Health* may provide this Court with the best vehicle for resolving whether ERISA preempts state independent review laws. *See infra* part E.

[14] A more comprehensive discussion of the conflict as to whether state independent review laws provide an alternative enforcement mechanism to ERISA § 502 is contained in the Brief of NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 2-7.

the active members of the court in accordance with Circuit Rule 40(e).[15] The dissent to the rehearing en banc similarly recognized the conflict with the Fifth Circuit.[16]

The Fifth Circuit determined that the Texas independent review law was preempted because it conflicted with the remedies of § 502 by creating an alternative procedure for obtaining benefits due under an ERISA plan.[17] The Fifth Circuit, citing *Pilot Life*, emphasized that § 502 preempts not only directly conflicting remedial schemes, but also supplemental state law remedies.[18]

According to the Seventh Circuit, the Illinois independent review law does not provide an alternative enforcement mechanism in conflict with ERISA § 502.[19] The Illinois independent review law merely adds a supplemental "internal" procedure to the insurance contract that is used to make a medical necessity decision in the event that the HMO and a patient's primary care physician disagree.[20] The Seventh Circuit observed that the determination of the reviewing physician would be enforced under § 502(a)(1)(B), and therefore the independent review law alters the plan itself, rather than the mechanism to enforce the plan.[21]

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[15] *Moran*, 230 F.3d at 972 n. 7.

[16] *Id.* at 973.

[17] *Corporate Health*, 215 F.3d at 538-539 (citations omitted).

[18] *Id.*

[19] *Moran*, 230 F.3d at 971.

[20] *Id.* at 971-972.

[21] *Id.*

B. *Moran* Raises Compelling Issues of Great Public Importance.

1. The resolution of conflicts regarding the validity of state independent review laws are of great public importance.

Independent review laws are particularly important[22] because they are an example of state insurance laws enacted in response to consumer concerns about the decisions made by managed care plans involving their health care.[23] Independent review laws were adopted in the states in the wake of decreased consumer confidence in the health care system and managed care in particular.[24] An insurance regulator's primary responsibility is to protect the interests of insurance consumers,[25] and independent review is heralded as being "a fair, impartial and usually expeditious way to resolve disputes."[26]

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[22] A more comprehensive discussion of the importance of resolving conflicts regarding state independent review laws is contained in the Brief of NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 7-12.

[23] "[External review programs] are meant to address concerns about managed care incentives that might lead to inappropriate denial of care, and to help restore public confidence in managed care." Karen Pollitz, Geraldine Dallek and Nicole Tapay, Institute for Health Care Research and Policy, Georgetown University, *External Review of Health Plan Decisions: An Overview of Key Program Features in the States and Medicare*, Nov. 1998, at 1, 7 [hereinafter *External Review of Health Plan Decisions*].

[24] *Managed Care Regulation and Oversight in Nine States*, Issue Brief, National Governor's Association for Best Practices, June 28, 2000, at 2, 3.

[25] NAIC, *A Tradition in Consumer Protection*, 1998, at 1.

[26] *External Review of Health Plan Decisions*, *supra* note 23, at 1.

To date, 38 states plus the District of Columbia have enacted independent review laws. The Kaiser Family Foundation updated its November 1998 study of independent review laws in May 2000 documenting a doubling in the number of such state laws.[27]

Through the enactment of independent review laws, state legislatures have expressed the judgment that insurers, at least in certain circumstances, do not deserve deference when they are engaged in medical decision-making to determine insurance coverage.[28] Entrusted by ERISA with the regulation of insurance, the legislatures have determined that only a person free of conflicts should be permitted to make final decisions of such delicacy, discretion, and life or death importance. State independent review laws are intended to improve the quality of care provided by the plan, and consumers benefit from the knowledge that an independent, unbiased review of a health plan's decision is available.[29]

2. State laws that regulate insurance and add an enforcement mechanism or other remedy to those provided by ERISA § 502 are an important part of the regulation of insurance reserved for the states in § 514(b)(2)(A).

The Seventh Circuit in *Moran* held that the Illinois independent review law did not create an alternative enforcement mechanism in conflict with ERISA § 502.

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[27] Geraldine Dallek and Karen Pollitz, Institute for Health Care Research and Policy, Georgetown University, *External Review of Health Plan Decisions: An Update*, May 2000, at 1 [hereinafter *External Review Update*].

[28] See discussion of this Court's decision in *Firestone Rubber v. Bruch*, 498 U.S. 101 (1989) in Brief of NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 10-12.

[29] *External Review Update supra* note 27.

However, the Fifth Circuit reached the opposite conclusion and held that the Texas independent review law provided a remedy to plan members seeking benefits.[30] Under the Fifth Circuit's rationale, ERISA preempts all such supplemental state remedies, regardless of the application of the saving clause.

This Fifth Circuit rationale directly threatens private parties seeking to enforce certain state insurance laws,[31] and applied broadly, may even call into question the enforcement authority of state insurance regulators.[32] We do not believe the Fifth Circuit's rationale goes so far as to preclude state insurance regulator actions to enforce laws such as those governing unfair claim practices. However, some courts might erroneously fail to distinguish state insurance regulator enforcement actions that result in orders to pay claims, as well as penalties. This Court should grant the Petition for a Writ of Certiorari and affirm insurance regulators' ability to protect insurance consumers by upholding the Seventh Circuit's rationale in *Moran*.

C. The Applicability of the Saving Clause is Not an Issue Worthy of Supreme Court Review.

1. There is no conflict as to whether state independent review laws are saved as laws regulating insurance.

Both the Fifth Circuit in *Corporate Health* and the Seventh Circuit in *Moran* recognized that the independent review laws at issue regulated insurance within the

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[30] *Corporate Health*, 215 F.3d at 539.

[31] *See Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988).

[32] See discussion of the importance of state insurance laws that provide an enforcement mechanism or other remedy in Brief of NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 12-13.

meaning of ERISA's saving clause, § 514(b)(2)(A). Contrary to the Assertions of the Petition,[33] and the dissent in *Moran*,[34] there is no legal basis for this Court to question the applicability of the saving clause to state independent review laws. This is an issue about which there is uniformity in the Fifth and Seventh Circuits and no conflicting decisions.

The Fifth Circuit held that the Texas independent review law "meet[s] the common-sense test of the saving clause" and "satisf[ies] the second and third prongs of the McCarran-Ferguson test."[35] The Seventh Circuit likewise held that the Illinois law "regulates insurance under a common sense understanding" and clearly "meets at least two of the McCarran-Ferguson factors."[36] Accordingly, this Court should not disturb the judgment of the circuit courts with respect to this issue.

2. Independent review laws are clearly laws that regulate insurance within the meaning of the saving clause.

Independent review laws are laws that regulate insurance within the meaning of the saving clause. However, the Petition alleges that the Illinois independent review law does not regulate insurance because it applies to all HMOs "whether the HMO is acting as an insurer or merely the administrator of a benefit plan as to which another entity bears the risk." Petition for a Writ of Certiorari (No. 00-1021) at 24. While this Court need not reach this issue, the Illinois law clearly regulates insurance within the meaning of the saving clause.

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[33] Petition for a Writ of Certiorari, *Moran* (No. 00-1021) at 23-25.

[34] *Moran*, 230 F.3d at 973-974.

[35] *Corporate Health*, 215 F.3d at 538.

[36] *Moran*, 230 F.3d at 969.

The application of the Illinois independent review law does not extend to HMOs acting as administrators to self-insured plans.[37] The Illinois independent review law applies to HMOs in their capacity as insurers, regulated under the Illinois HMO Act.[38] Section 4-10 of the Act requires that "[e]ach Health Maintenance Organization" provide a mechanism for independent review. 215 Ill. Comp. Stat. 125/4-10. The definition of a "health maintenance organization" makes clear that the law is intended to apply to HMOs in their capacity as risk bearing entities.[39] The definitions of "organization"[40] and "health care plan"[41] further illustrate that Section 4-10 and the

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[37] Even if this law were to extend to administrators of self-insured plans, this Court should only invalidate the application of this law to self-insured plans. *See FMC Corp. v. Holliday*, 498 U.S. 52, 65 (1990) (holding that the Pennsylvania anti-subrogation law at issue was preempted to the extent it applied to self-insured plans).

[38] 215 Ill. Comp. Stat. 125/1-1 *et seq.* (2000).

[39] " 'Health maintenance organization' means any *organization* formed under the laws of this or another state to provide or arrange for one or more health care plans under a system which causes any part of the *risk of health care delivery* to be borne by the organization or its providers." 215 Ill. Comp. Stat. 125/1-2 (emphasis added).

[40] " 'Organization' means any insurance company, a nonprofit corporation authorized under the Dental Service Plan Act [215 Ill. Comp. Stat. 110/1 *et seq.*] or a Voluntary Health Services Plans Act [215 Ill. Comp. Stat. 165/1 *et seq.*], or a corporation organized under the laws of this state or another state for the purpose of operating one or more health care plans and doing *no other business other that that of a health maintenance organization or an insurance company.*" 215 Ill. Comp. Stat. 125/1-2 (emphasis added).

[41] " 'Health care plan' means any arrangement whereby any organization undertakes to *provide or arrange for or reimburse the cost of basic health care services* from providers selected by the Health Maintenance Organization, and such arrangement

Illinois HMO Act exclusively apply to HMOs engaged in the business of insurance. An HMO that is acting as an administrator for a self-insured plan is clearly beyond the scope of the Illinois law. An administrative services only contract is not an insurance product and is not subject to the Illinois HMO Act.[42]

From a common sense perspective, the Illinois independent review law regulates insurance.[43] A law regulates insurance if it is aimed at the insurance industry. *Pilot Life*, 481 U.S. at 50. The Illinois independent review law specifically applies to HMOs.[44] Illinois regulates

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consists of arranging for or the provision of such health care services as distinguished from mere indemnification against the cost of such services. . . . " 215 Ill. Comp. Stat. 125/1-2. (emphasis added).

[42] In addition, the Illinois Managed Care Reform and Patient Rights Act, 215 Ill. Comp. Stat. 134/1 *et seq.*, which provides details regarding the practical operation of the independent review procedure, contains a definition of "health plan" that specifically excludes self-insured ERISA plans. *See* discussion *supra* at pp. 4-5.

[43] According to this Court, whether a state law "regulates insurance" depends on a "common sense" understanding of insurance regulation. Also relevant are the three "guideposts" used to determine the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* The three factors are: (1) whether the law has the effect of transferring or spreading a policyholder's risk; (2) whether the law is an integral part of the policy relationship between the insurer and the insured; and (3) whether the law is limited to entities within the insurance industry. *Unum v. Ward*, 526 U.S. 358, 373-375 (1999) (citations omitted).

[44] "Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician . . . in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by a primary care physician. . . . " 215 Ill. Comp. Stat. 125/4-10.

HMOs as insurers.[45] This Court also understands that HMOs are insurers. In *Pegram v. Herdrich*, 120 S. Ct. 2143, 2149 (2000), this Court described the evolution of traditional fee for service insurance to HMOs and recognized that HMOs are risk-bearing organizations that function much like traditional insurers. Therefore, a law that "regulates HMOs" clearly regulates insurance from a "common sense" perspective.[46]

The three McCarran-Ferguson guideposts reinforce the common sense understanding of the Illinois independent review law as a law that regulates insurance. First, the law has the effect of transferring or spreading a policyholder's risk. The Petitioner asserts that Section 4-10 "does not have the effect of spreading a policyholder's risk" [see, Petition For Writ of Certiorari, at 24]. According to the Secretary of Labor in its amicus brief before the Seventh Circuit in *Moran*, the Illinois independent review law spreads risk by requiring an HMO to use a certain procedure for determining which claims to pay. This procedure is an integral part of risk-spreading because it determines which risks will be spread and in what manner.[47] Indeed, HMOs factor these risks into setting the premiums for their contracts, which is a central element of risk spreading.

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[45] *See In The Matter of Estate of MedCare HMO*, 998 F.2d 436 (7th Cir. 1993).

[46] *See Washington Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998). *But see O'Reilly v. Ceuleers*, 912 F.2d 1383 (11th Cir. Fla. 1999) (distinguishable because the ERISA plan at issue was not an insured plan; the HMO was acting as an administrator; and the court relied on dicta in this Court's 1982 decision, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 339 n. 7 (1982), which has since been clarified by this Court's opinion in *Pegram*, 120 S. Ct. at 2149.

[47] Brief of the Secretary of Labor as Amicus Curiae, *Moran* (No. 99-2574) (*available in* www.dol.gov/pwba/public/pubs/ab/moranfin.txt) at 8.

The remaining two McCarran-Ferguson factors are also plainly satisfied. The Illinois independent review law is an integral part of the policy relationship between the insurer and the insured and is limited to entities within the insurance industry. Similar to the notice-prejudice rule at issue in *Ward*, the Illinois independent review law goes to the heart of the insurer-insured relationship by dictating the process whereby the HMO decides whether benefits are owed to the insured.[48] The Illinois independent review law is also similar to the mandated benefit law at issue in *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985). In *Metropolitan Life*, this Court held that the Massachusetts mandated benefit law regulated insurance because it directly controlled the terms of insurance contracts by requiring a particular provision in the contract. *Id.* at 724. Accordingly, the Illinois independent review law provides an insured with a contractual right to an independent grievance process.

The dissent from the denial of rehearing en banc in *Moran* challenged the Seventh Circuit's conclusion that the Illinois independent review law becomes a substantive term in all insurance policies because an action to enforce the decision of an independent reviewer can be brought under § 502 as an action to enforce the terms of the plan.[49] According to the dissent, the Illinois independent review law "invites states to evade the preemptive force of ERISA simply by deeming its regulations of ERISA plans to be plan terms."[50] The dissent contends that the Illinois independent review law could not both regulate insurance and become a part of the ERISA plan enforceable in federal court.[51]

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[48] *See* 526 U.S. at 374-375.

[49] 230 F.3d 959, 971.

[50] *Id.* at 974.

[51] *Id.*

What the dissent characterizes as "evasion" of ERISA's preemptive force is really the proper and intended application of the saving clause – to "save" state laws that regulate insurance by altering the terms of the insurance contract. This Court has recognized that disuniformities inevitably result from the application of the saving clause, since insured plans in different jurisdictions will provide different coverage in order to comply with varying state insurance laws.[52] However, if plans were able to displace any state regulation by inserting a contrary term in plan documents, it would "virtually read the saving clause out of ERISA."[53] This Court has "repeatedly held that state laws mandating insurance contract terms are saved from preemption."[54] In *Ward*, the notice-prejudice rule provided the relevant rule of decision in a § 502 suit to recover benefits due under the terms of the plan.[55]

An agreement with an HMO providing benefits to an ERISA plan becomes part of the ERISA plan. This Court in *Pegram* explained that an HMO that contracts with an employer to provide benefits is not an ERISA plan, "but the agreement between an HMO and an employer who pays the premiums may [ ] provide elements of a plan by setting out rules under which beneficiaries will be entitled to care."[56] In short, the HMO is not the ERISA plan, but the HMO provides the terms of the ERISA plan

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[52] *Ward*, 526 U.S. at 376 n. 6.

[53] *Id.* at 376.

[54] *Id.* at 375-376, citing *Metropolitan Life*, 471 U.S. at 758 ("Massachusetts' mandated-benefit law is a 'law which regulates insurance' and so is not preempted by ERISA as it applies to insurance contracts purchased for plans subject to ERISA.")

[55] 526 U.S. 358, 376-377.

[56] 120 S. Ct. at 2151 (citations omitted).

through the insurance contract.[57] Therefore, when an employer decides to purchase insurance rather than self-insure an ERISA plan, state insurance laws continue to apply to the insurer and an ERISA plan indirectly.[58]

The dissent in *Moran* also asserts that the Illinois independent review law adds procedural burdens and increases "costs in the administration of ERISA plans [that] will shrink benefits and deter some employers from offering health insurance at all."[59] The issue of cost is irrelevant to whether a law regulates insurance within the meaning of ERISA's saving clause, § 514(b)(2)(A). Mandated benefit laws add costs to the plans that choose to purchase insurance rather than self-insure. This fact did not prevent this Court from deciding in *Metropolitan Life* that the Massachusetts mental health law regulated insurance within the meaning of the saving clause. Similarly, procedural protections like the notice-prejudice rule at issue in *Ward* add costs by causing claims to be paid that would otherwise be denied. A law mandating independent review is no different.

Moreover, there is no evidence that independent review laws have a negative effect on the marketplace. The November 1998 Kaiser Family Foundation study cites several studies conducted to estimate indirect costs in complying with external review laws, such as the cost of care associated with overturned denials.[60] Price Waterhouse estimated costs for California's external review law

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[57] An ERISA plan is only "bound by state insurance regulations insofar as they apply to the plan's insurer." *FMC Corp.*, 498 U.S. at 61.

[58] *FMC Corp.*, 498 U.S. 52, 64 (1990).

[59] 230 F.3d at 973-974.

[60] *External Review of Health Plan Decisions, supra* note 23 at 46.

to be three cents per member per month.[61] The Congressional Budget Office Study estimated the potential costs of a federally mandated independent review law to be 0.3% of premium.[62] The 1998 Kaiser Family Foundation study reported that according to an industry representative, "whatever costs a plan might incur from external review, they are modest and a 'well spent business expense' in light of the contribution to improved customer relations he believes external review generates".[63]

3. The deemer clause does not apply in this case.

The Petitioner in *Moran* references the district court's decision to deny reconsideration.[64] The district court was not persuaded to review its earlier decision in light of this Court's decision in *Ward*. Instead, the district court erroneously determined that the Illinois independent review law was preempted under the deemer clause. The deemer clause is not applicable in this case. The deemer clause operates to shelter self-insured ERISA plans from state insurance regulation.[65] In *Ward*, this Court dismissed the deemer clause argument because a self-insured plan was not at issue.[66] Neither does *Moran* involve a self-insured plan. The Illinois independent review law applies to HMOs in their capacity as insurers. According to this Court, an ERISA plan may be regulated indirectly through the regulation of its insurer.[67]

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[61] *Id.* at 47.

[62] *Id.*

[63] *Id.* at 46.

[64] Petition for Writ of Certiorari, *Moran* (No. 00-1021) at 9 n. 3.

[65] *Ward*, 526 U.S. 358, 367 n. 2 (citations omitted).

[66] *Id.*

[67] *FMC Corp.*, 498 U.S. at 64.

D. The Seventh Circuit Decision Reaches the Correct Result; Independent Review Laws do not Provide Remedies that Conflict with § 502, and Even if They are Remedies, They are Subject to the Saving Clause.

The Courts of Appeals for the Fifth Circuit and the Seventh Circuit reached opposite conclusions regarding whether ERISA preempts state independent review laws. According to the Seventh Circuit, the independent review law regulated insurance within the meaning of the saving clause, and did not provide an alternative enforcement mechanism in conflict with ERISA § 502. This Court should uphold the Seventh Circuit's rationale and find that ERISA does not preempt state independent review laws.

However, the Fifth Circuit in *Corporate Health* reached the opposite conclusion with respect to Texas's independent review law. The Fifth Circuit, citing *Pilot Life*, emphasized that § 502 preempts not only directly conflicting remedial schemes, but also supplemental state law remedies.[68] The Fifth Circuit determined that, despite regulating insurance within the meaning of the saving clause, the Texas independent review law was preempted because it created an alternate procedure for obtaining benefits that conflicted with the remedies of § 502.[69]

The Fifth Circuit's decision is incorrect.[70] State independent review laws do not create an alternate enforcement mechanism to § 502.[71] Even if this Court finds that

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[68] *Corporate Health*, 215 F.3d at 358-359.

[69] *Id.* at 539 (citations omitted).

[70] A comprehensive discussion of the merits issues raised by *Corporate Health* and *Moran* is contained in the NAIC Brief as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 13-20. See also *Franklin Trust*, 50 F.3d 144.

[71] *See* Brief of NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 14-16.

state independent review laws do provide for an alternate enforcement mechanism, the laws are saved from preemption under ERISA § 514(b)(2)(A).[72]

E. The Fifth Circuit's decision in *Corporate Health* case is the preferable vehicle for the resolution of the issue presented in both *Corporate Health* and *Moran*.

Corporate Health and *Moran* raise the identical issue for review before this Court – whether ERISA preempts state independent review laws. This Court should grant and hold the Petition for a Writ of Certiorari in *Moran*. The Illinois independent review law at issue in this case is not the only law providing the right to independent review in Illinois. The Illinois legislature enacted the Managed Care Reform and Patient's Rights Act in 1999, which contains an indepe lent review provision.[73] The Managed Care Reform and Patient's Rights Act independent review provision is not at issue in *Moran* and is not presently before this Court.

In addition, the Fifth Circuit's decision in *Corporate Health* conflicts the Seventh Circuit's decision in *Moran* as well as the Second Circuit's decision in *Franklin Trust*.[74]

The second of these conflicts arises out of disparate readings of *Pilot Life*. Because the Fifth Circuit in Corporate Health found that the state independent review law did establish an alternative enforcement mechanism, it reached the question of whether the saving clause could preserve such a mechanism or supplemental remedy from preemption. Thus, *Corporate Health* presents this Court with a clearer

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[72] *Id.* at 16-20.

[73] *See* discussion *supra* at pp. 4-5.

[74] *See* Brief of NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari, *Corporate Health* (No. 00-665) at 6-7.

opportunity to resolve not only whether state independent review laws create alternative enforcement mechanisms to § 502, but also whether the insurance saving clause can preserve from preemption a state law regulating insurance that also creates a remedy supplemental to ERISA § 502. *Moran* does not directly present this Court with the same opportunity to revisit *Pilot Life*.

For these reasons, the NAIC suggests that the Texas independent review law at issue in *Corporate Health* is the preferable vehicle for this Court to decide whether state independent review laws are preempted under ERISA. The Petition for a Writ of Certiorari in *Moran* should be granted and held in light of this Court's decision in *Corporate Health*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case held.

Respectfully submitted,

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